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IN THE

Supreme Court of the United States

OCTOBER TERM, 1963

No. [redacted] 77

FEDERAL CARTRIDGE CORPORATION, *Appellant*,

v.

THE SUPERIOR COURT OF CREEK COUNTY, BRISTOW DIVISION, THE HONORABLE G. B. CORYELL, FRED ESPY, and GENE SEARS, *Appellees*.

On Appeal From the Supreme Court of Oklahoma

MOTION OF APPELLEE FRED ESPY TO DISMISS THE APPEAL

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As authorized by this Court's Rule 16, Appellee Fred Espy herewith respectfully moves this Court to dismiss Federal Cartridge Corporation's asserted appeal as of right herein, on the following grounds:

I. The history of this litigation

In this asserted appeal as of right, the appellant Federal Cartridge Corporation challenges the constitutionality of an Oklahoma venue statute (Title 18 O.S.A. 1.204(a)). This venue statute deals specially

with foreign corporations which are doing business in Oklahoma, but which have failed to comply with Oklahome's statutory requirement that these corporations appoint a registered agent upon whom service of summons or other process may be had. As to such delinquent foreign corporations illegally doing business in the state, the venue statute provides that they may be sued in any County in Oklahoma, after service upon Oklahoma's Secretary of State. It should be emphasized that there are no such broad venue provisions in Oklahoma's laws with respect to foreign corporations which have properly qualified to do business in the state.

It is Federal Cartridge's primary contention that the aforesaid special venue statute violates the equal protection clause of the Fourteenth amendment to the U. S. Constitution, by providing a far greater range of venue for foreign corporations illegally doing business in Oklahoma than is provided in other statutes of the state for domestic corporations, and for foreign corporations properly domesticated. Federal Cartridge asserts a right to challenge Oklahoma's special venue statute because, under the broad provisions thereof, Federal Cartridge has been sued by Fred Espy in an Oklahoma county where it could not have been sued, had it been a properly domesticated foreign corporation.

The factual premises underlying Federal Cartridge's contention should be made clear at the outset, beyond peradventure of doubt. Federal Cartridge's assertion in the instant Statement as to Jurisdiction that (p. 8) "it is not doing business within the State of Oklahoma" does not reflect an established fact of

record, nor does it reflect a jurisdictional issue raised and decided below. The sole issue raised by Federal Cartridge in the Oklahoma Supreme Court was whether or not Oklahoma could subject Federal Cartridge to suit in a county where venue would not lie against a domestic corporation or a foreign corporation legally doing business in the state. This was a justiciable issue only upon the factual predicates that (1) Federal Cartridge, a Minnesota corporation, was doing business in Oklahoma; and (2) Federal Cartridge had failed to meet Oklahoma's statutory requirements for doing such business in the state.

Hence, it is irrelevant here—as it was in the Supreme Court of Oklahoma—that Federal Cartridge alleged in various pleadings below, in ambiguous and conclusional terms, that it was not doing business in Creek County, where appellee Fred Espy filed his damage suit; and that it was not doing such business in Oklahoma as would require it to qualify to do business there. In this connection it may be noted that, although Fred Espy as respondent in the proceedings in the Supreme Court of Oklahoma sought to show on brief (R. 39 et seq.) that Federal Cartridge was doing business in Oklahoma under applicable statutes and legal concepts, the corporation expressly declined in its Reply Brief (R. 63 et seq.) to join issue on this point.

In any event, Federal Cartridge's standing to challenge the special venue provisions of Title 18 O.S.A. 1.204(a) is necessarily predicated upon the fact or assumption that it *was* doing business in Oklahoma at all pertinent times, but that (as conceded by Federal Cartridge in an affidavit annexed to its first motion in the trial court (R. 15)) the corporation "is not admitted to do business in the State of Oklahoma."

II. The asserted violation of the Fourteenth Amendment to the Constitution is not an issue cognizable by this Court in an appeal as of right

In an asserted appeal as of right, as this Court said in *Republic Gas Co.* v. *Oklahoma,* 334 U.S. 62, 70-71, "Appellant, of course, has the burden of affirmatively establishing this Court's jurisdiction." And where, as here, the asserted appeal draws in question the constitutionality of a state statute, appellant must satisfy this Court that the constitutional issue was timely raised below. More particularly, if the issue was raised for the first time in the supreme court of a state, as it was here, appellant must establish affirmatively that the contention was timely under the local laws and practice. *Memphis Natural Gas Co.* v. *Beeler,* 315 U.S. 649, 651.

In the case at bar, as appears from the transcript of record docketed in this Court, Federal Cartridge did not raise any question of constitutionality in the trial court; the equal protection clause of the Fourteenth Amendment was invoked for the first time in the Supreme Court of Oklahoma.* It follows, under the above authorities, that appellant has the affirmative burden of showing that the constitutional question was timely raised under the local laws and practice. Federal Cartridge has not even attempted to make such a showing in its Statement as to Jurisdiction.

A related requirement for the establishment of this Court's jurisdiction over appeals as of right is that appellant affirmatively show that the highest court of

* The issue appellant attempts to raise here with respect to compliance with the Constitution of Oklahoma was raised for the first time in appellant's Petition for Rehearing in the Supreme Court of Oklahoma (R. 71). This issue is dealt with below.

the state deemed the constitutional question to be in issue (*Memphis Natural Gas Co.* v. *Beeler, supra,* p. 651), and expressly passed on it (this Court's Rule 16.1(b)). In the instant case, it may be noted that the orders entered by the Supreme Court of Oklahoma denying Federal Cartridge's application of a writ of prohibition (R. 70, 95) give no reasons whatever for the action taken. Thus it cannot be known whether the Supreme Court of Oklahoma deemed the Fourteenth Amendment question to be in issue, and intended to adjudicate the question by its orders.

Finally, appellant has the considerable burden in asserted appeals as of right of showing affirmatively that the constitutional question is "substantial". The mere reference to a provision of the Federal Constitution, or the mere assertion of a claim under it, does not automatically confer jurisdiction upon this Court. *Sugarman* v. *United States,* 249 U.S. 182, 184. This Court conceives it to be its "duty to decline jurisdiction whenever it appears that the constitutional question presented is not * * * substantial in character." *Zucht* v. *King,* 260 U.S. 174, 176. Accordingly, the Rules of this Court require an affirmative showing of substantiality in the appellant's Juridictional Statement (Rule 15.1(e)), and authorize a motion to dismiss on the ground *inter alia* that the asserted appeal "does not present a substantial federal question" (Rule 16.1(b)).

Again, appellant has failed to discharge its affirmative burden of establishing jurisdiction. The section of its Statement as to Jurisdiction devoted to the contention that "The Federal Question is Substantial" (pp. 7-16) attempts to magnify the issue by implying that all foreign corporations doing business in Okla-

homa are affected. This is not the case. As set forth above, the special venue statute involved applies only to foreign corporations illegally doing business in Oklahoma—not to foreign corporations which have properly qualified to do business in the state. Appellant has not shown, or attempted to show, that there is a large class of foreign corporations illegally doing business in Oklahoma. Moreover, appellant takes no account of the powers of the state to police and penalize such corporations.

In *Zucht* v. *King, supra,* this Court held that a "substantial" federal question was not presented because the state law involved was obviously within the police powers of the state. More to the point here is *Interstate Amusement Co.* v. *Albert,* 239 U.S. 560. There the appellant sought to challenge a Tennessee statute which penalized foreign corporations illegally doing business within the state by providing that any contracts entered into in Tennessee by such foreign corporations were null and void, and could not be enforced by such foreign corporations in the courts of Tennessee. This Court held that (p. 170) "The insistence based upon the "equal protection" clause is *unsubstantial,* and calls for no discussion." [Emphasis supplied].

As this Court said in *International Shoe Co.* v. *Washington,* 326 U.S. 310, 319:

> But to the extent that a corporation exercises the privilege of conducting activities within a state, it enjoys the benefits and protection of the laws of that state. The exercise of that privilege may give rise to obligations, and, so far as those obligations arise out of or are connected with the activities within the state, a procedure which re-

quires the corporation to respond to a suit brought to enforce them, can, in most instances, hardly be said to be undue.

III. The issue appellant attempts to raise with respect to the Constitution of Oklahoma is not a federal question, and in any event was untimely raised below

In addition to invoking the equal protection clause of the Fourteenth Amendment, appellant attempts to raise a second issue in its Statement as to Jurisdiction (p. 4) as to compliance with the Constitution of Oklahoma. This contention merits little discussion.

A state court decision is, though it grounds are not indicated, binding on this Court so far as state law is concerned. *Williams* v. *Kaiser,* 323 U.S. 471. Insofar as the decision of a state court involves construction of the state's constitution and laws, it is not reviewable by this Court; compliance *vel non* with a state's constitution is not a federal question. This is settled by many decisions of this Court, including *Southern R. Co.* v. *Wright,* 151 U.S. 470, *Atchison T. & S. F. R. Co.* v. *Railroad Commission,* 283 U.S. 380, and *Screws* v. *U. S.,* 325 U.S. 91.

Moreover, it is well-settled under Oklahoma law that an issue raised for the first time on a petition for rehearing is untimely, unless it goes to the jurisdiction of the court in which the petition for rehearing is filed or unless extraordinary circumstances mitigate the failure to raise the issue earlier. *Brown* v. *State Election Board,* 369 P. 2d 140, 151 (Okla.); *accord, Reed* v. *State Election Board,* 369 P. 2d 156 (Okla.).

CONCLUSION

Upon all of the foregoing grounds, appellee Fred Espy respectfully moves this Court to dismiss the asserted appeal as of right herein.

Respectfully submitted,

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Certificate of Service

I hereby certify that on this 11th day of June, 1964, in compliance with this Court's Rule 33.3(b), I mailed a copy of the foregoing motion, airmail postage prepaid, to James H. Ross, Esq., at his last-known office address, 1415 First National Building, Oklahoma City, Oklahoma, and further that I mailed a copy of the foregoing motion, postage prepaid, to John L. Laskey, Esq., at his last-known office address, 1025 Connecticut Avenue, Washington, D. C.

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Fred Espy